STATE OF MICHIGAN

COURT OF APPEALS

MARY JANE YAUNKE, ROBERT YAUNKE, and CINDY YAUNKE,

Plaintiffs-Appellees,

v

MERCY GENERAL HEALTH PARTNERS, a/k/a TRINITY HEALTH MICHIGAN,

Defendant-Appellant,

and

MIMA BACIC, M.D., JOHN E. COLLETT, D.O., LIFECARE HOSPITALS OF WESTERN MIGHIGAN a/k/a NEXTCARE HOSPITAL/ MUSKEGON, INC., and EPMG OF MICHIGAN PC/EMERGENCY ROOM PHYSICIANS,

Defendants.

UNPUBLISHED
June 15, 2006

No. 258625
Muskegon Circuit Court
LC No. 04-043140-NM

Before: O'Connell, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Defendant Mercy General Health Partners, also known as Trinity Health Michigan, appeals by leave granted the trial court's August 20, 2004, order denying its motion for summary disposition.[1] We reverse.

Plaintiffs filed the instant action, alleging that defendant committed medical malpractice during the intravenous administration of calcium glucomate to plaintiff Mary Jane Yaunke, creating an open wound on her left forearm, which required surgery and left Yaunke with loss of movement, loss of use of her left hand, constant pain, and significant scarring. Plaintiffs

[1] Only Mercy General Health Partners is appealing the trial court's order, and we shall refer to Mercy General Health Partners as "defendant" throughout the remainder of this opinion.

attached purported affidavits of merit from David H. Goldstein, M.D., Daphna J. Goren, M.S., R.N., M.S.N., and Jay B. Krasner, M.D., along with the Notice of Intent and an operative report relating to the debriding of the wound, to their complaint. The trial court determined that the affidavits of Dr. Goldstein and Dr. Krasner did not constitute appropriate affidavits of merit against defendant, who was faced with allegations of nursing malpractice. The trial court then concluded, however, that, despite numerous defects, Goren's affidavit was sufficient under MCL 600.2912d to allow the case to proceed because it was not grossly nonconforming. Defendant argues that the trial court erred in this determination. We agree.

We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *Mouradian v Goldberg*, 256 Mich App 566, 570-571; 664 NW2d 805 (2003); *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). We also review questions of statutory interpretation and questions of law relating to the sufficiency of an affidavit of merit de novo. See *McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488, 490 n 1; 711 NW2d 795 (2006).

As this Court explained in *Apsey v Mem Hosp (On Reconsideration)*, 266 Mich App 666, 671; 702 NW2d 870 (2005), citing *Scarsella v Pollak*, 461 Mich 547, 552-553; 607 NW2d 711 (2000), "a valid affidavit of merit must be filed with the complaint in order to commence [a medical malpractice] action and to toll the period of limitations." The appropriate remedy for failure to file an affidavit of merit meeting the requirements set forth in MCL 600.2912d is dismissal of the complaint without prejudice unless the limitations period has expired, in which case dismissal with prejudice is required. *Kirkaldy v Rim (On Remand)* 266 Mich App 626, 629, 633-637; 702 NW2d 686 (2005); *Mouradian, supra* at 571-572; *Holmes, supra* at 706-707, 709.

Minimal analysis is necessary to resolve this appeal. MCL 600.2912d(1) sets forth the requirements for an affidavit of merit. The trial court found various defects with Goren's affidavit at the time of summary disposition, but nonetheless allowed it to be considered because the affidavit was not grossly nonconforming. Plaintiffs have not appealed the trial court's finding that Goren's affidavit was defective, nor have they appealed the court's rulings on the additional affidavits. Furthermore, plaintiffs concede the existence of some of the defects at the time of summary disposition. Our ruling is limited to the arguments proffered by plaintiffs and the appellate decisions they have made.

A failure to file an affidavit that complies with the mandatory requirements of MCL 600.2912d, regardless whether the defect in the affidavit rises to the level of gross nonconformance with the statute, requires dismissal of a plaintiff's complaint with prejudice if, like here, the statute of limitations has run. *Apsey, supra* at 677-678; *Kirkaldy, supra* at 636-637; *Geralds v Munson Healthcare*, 259 Mich App 225, 239-240; 673 NW2d 792 (2003).[2] Accordingly, the trial court erred in failing to dismiss plaintiffs' action.

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[2] In *Mouradian, supra* at 573-574, this Court held that a timely filed affidavit that was "grossly nonconforming" relative to MCL 600.2192d was insufficient to constitute an affidavit of merit under that statute, and thus, failed to toll the period of limitations. However, in *Geralds, supra* at
(continued…)

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ Kurtis T. Wilder

(…continued)

239-240, this Court eliminated any distinction between affidavits that are nonconforming and those that are "grossly nonconforming" such that the filing of a defective affidavit of merit dictates dismissal, regardless whether the defective affidavit is grossly nonconforming or nonconforming to a less egregious extent. *Kirkaldy, supra* at 635-637.